

Appl. No. 09/919,748
Arndt, dated April 30, 2004
Reply to Office Action of November 24, 2003

PATENT

REMARKS/ARGUMENTS

Review and reconsideration of the Application are respectfully requested in view of the following remarks.

STATUS OF THE APPLICATION

The prosecution of this application has been unduly long and tortuous in Applicant's view. The Application was filed July 31, 2001. A first Office Action was mailed September 11, 2002. In the First Office Action, pending claims 1-4, 6, 7-12, and 16-20 were rejected under 35 U.S.C. §102(b) over Kramer et al. '727. Claims 1-4, 8-11 and 16-20 were also rejected under U.S.C. §102(b) over the inventor's (Gillis) own '527 patent. Further, claims 1-20 were rejected under 35 U.S.C. §103(a) over the combined teachings of Bryant '852 and Pelsue et al. '499.

In response, the Applicant easily demonstrated that the Kramer et al. '727 embodiments on which the Examiner relied did not disclose or suggest tension members that extend across four sided openings to tension the shelter structure, and therefore could not anticipate the claims as recited. Applicant further easily demonstrated that the Gillis '527 patent does not even constitute prior art to the present application. With respect to the §103(a) rejection, Applicant easily demonstrated that the Examiner had misunderstood a rolled up portion of a fly for a tension harness in Pelsue, and had failed to provide any reason a person of ordinary skill in the art would be motivated to combine the Pelsue and Bryant references, given that they disclose completely different structures, one of which (Pelsue) is not even dome-shaped, but rather an A-frame arrangement.

On January 29, 2003, the Examiner mailed a second Office Action. In this Office Action, the Examiner withdrew all of her earlier arguments and replaced them with completely new arguments. The Examiner rejected claims 1-20 under 35 U.S.C. §103(a) over the combined teachings of Warner et al. '520 and Cannon '999. Although the Examiner stated that the new grounds of rejection was necessitated by Applicant, Applicant's only amendments in response to the prior Office Action had been to address some §112 issues raised by the Examiner, and

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Applicant did not substantially amend any of the claims substantively. Nevertheless, the Examiner made this rejection final.

On May 20, 2003, Applicant's attorney had a telephone interview with the Examiner in an attempt to convince her that the newly cited references were not even as relevant as the previously cited references, and to address additional §112 issues raised by the Examiner. Unfortunately, the Examiner could not be swayed.

Applicant then filed an Amendment After Final under 37 C.F.R. §1.116 in which he amended claims 5-7, 12-14, and 16-17 to address the Examiner's additional §112 issues. Applicant also took the opportunity to point out to the Examiner that the newly cited Warner et al. reference did not even disclose a structure with tensioned poles as recited in the claims, and that there was no need or disclosure for a tension harness in such a structure. Applicant also pointed out that the Cannon reference did not even disclose a structure with crossing poles as recited in the claims, but instead included a plurality of upright poles with a flexible membrane supported on top of them. The cited references were so clearly different from the recited claims that Applicant was sure the Examiner would issue the application, but Applicant's hopes were soon dashed.

On June 6, 2003, the Examiner issued an Advisory Action in which she entered Applicant's proposed claim amendments to deal with the §112 issues, but continued to reject claims 1-20 *without any explanation or even acknowledgement of the clear points of distinction raised by Applicant between the recited references and the claims.*

This "non-action" by the Examiner of course required Applicant to go to the substantial time and expense of preparing a notice of appeal and appeal brief. Applicant filed his notice of appeal on June 30, 2003 and his 17-page appeal brief on August 29, 2003. In the Appeal Brief, Applicant explained exactly the same reasons why the cited Warner et. al and Cannon references did not teach or suggest the elements of the claims as recited, and in fact were not even close.

Rather than address Applicant's Appeal Brief on the merits and stand by her cited prior art and her rejections, on November 24, 2003 the Examiner issued the present Office Action. In this Office Action, the Examiner mentioned *not one word* about the prior art

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references she had previously relied on so heavily that she required Applicant to go to the substantial time and expense of preparing an extensive appeal brief. Instead, she now relies on a completely new ground of rejection based on a completely new prior art reference. Applicant cannot help but surmise that the Examiner knew her ground of rejection based on the previously cited Warner et al. and Cannon references was not well founded. Applicant has been prejudiced as a result both in terms of the expense of preparing and filing an unnecessary Appeal Brief, and in the loss of patent term resulting from the Examiner's actions.

CURRENT GROUNDS OF REJECTION

In the present Office Action, the Examiner has now reverted at least partly back to the basis for rejection expressed in the first Office Action dated September 11, 2002, approximately 1-1/2 years ago! The Examiner now rejects claims 1-20 under 35 U.S.C. §103(a) over the combined teachings of Kramer et al. '727 (the same reference she gave up on more than a year ago) and newly cited reference Gwin '483.

With respect to Gwin, the Examiner incorrectly indicates at p. 2 of the Office Action that Gwin is U.S. Patent No. 5,274,980. That is the number for the Ziegler reference not relied on by the Examiner. Gwin is U.S. Patent No. 5,634,483. At pgs. 2-4 of the Office Action, the Examiner discusses Gwin '483, not Ziegler '980.

With respect to Kramer et al. '727, the Examiner has essentially copied her description of the Kramer et al. '727 reference verbatim from the September 11, 2002 Office Action. Essentially the only difference is that the Examiner now additionally points to Fig. 13 of the Kramer et al. reference.

The Examiner admits that Kramer et al. does not disclose or suggest a tension harness that extends between non-adjacent vertices of a four-sided opening of a dome-shaped structure formed by crossed-poles under tension in order to tension the structure. This is the same deficiency pointed out by Applicant well more than a year ago in his October 2002 response to the first Office Action.

However, the Examiner contends that newly-cited Gwin '483 recites the missing deficiency and that the recited invention therefore would have been obvious to a person of

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ordinary skill in the art in view of the combined teachings. In particular, the Examiner contends teaches a shelter structure having a plurality of poles "connected together to define a plurality of four-sided openings (i.e., between poles 36, 37)" The Examiner further contends Gwin teaches "at least one tension harnesses (28) extending cross the opening and connecting each non-adjacent pair of diagonal vertices for providing stronger support to the flexible membrane (18) supported thereon."

The Examiner's new position is yet again based on a misreading or mischaracterization of a reference, this time the Gwin reference, which when carefully read clearly does not teach what the Examiner says it does. Furthermore, the Gwin structure is a very different structure from the Kramer et al. structure. The Gwin structure is more akin to the upright pole structure taught by Cannon that was previously abandoned by the Examiner. Neither then nor now does the Examiner provide any reason why a person of ordinary skill in the art would be led to combine the disparate teachings of the cited references. Rather, from all appearances, the Examiner is applying hindsight reconstruction in an effort to reconstitute the recited invention from disparate prior art disclosures.

When read carefully, Gwin teaches that support structures 15 extend between upright legs 11-14 thereby "defining a *square* shaped frame support *when fully extended.*" (emphasis added) Col. 2, lines 11-16. A center support post 17 extends upwardly at the center of the square structure. See Col. 2, lines 15-18. A central canopy support is mounted atop the center support post 17. See Fig. 2; Col. 2, lines 22-32. The support structures 15 have pairs of cross tubular elements 36 and 37, which are connected to the support legs 11-14 and to each other at hinge points, as shown in Fig. 5. See Col. 2, lines 64-67. Elastic bungee cords 28 extend from the central canopy support atop the central post 17 to eight evenly spaced locations around the support structures 15, as shown in Figs. 1-5. See Col. 2, lines 37-63, col. 3, lines 10-20.

It is immediately apparent that Gwin does not disclose a structure in which poles are crossed under tension in a generally arcuate shape to form a dome-shaped structure. Rather, Gwin is more akin to the Cannon reference previously abandoned by the Examiner in that it has upright poles 11-14 to support a canopy 18, with crossing segments (in this case poles 15, 16, 36,

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37) to space apart and hold the upright poles in a specific square shape. It is also apparent that in the Gwin structure, the bungee cords 28 themselves are tensioned to support the canopy 18, rather than a structure formed by crossed poles under tension. See Fig. 1, Col. 1, lines 55-58, Col. 3, lines 16-21 ("wherein the elastic cords 28 provide intermediate spaced radial support under the waterproof cover 18").

More specifically, it is apparent that on top of the Gwin structure, there are no four-sided openings defined by crossed poles, as recited in the claims. Indeed, there are no poles of any type that extend between the support structures 15 and the top of the canopy atop central post 17. Fig. 1 shows that the bungee cords 28 extend down from the top of the central post 17 to spaced locations on the support frame 15. The bungee cords themselves thus form *three*-sided openings, but these openings are not defined by pole sides, and the vertices are not defined by pole crossings.

The only possible four-sided opening in the Gwin structure is the opening formed between crossed pairs of tubular elements 36 and 37, as shown in Fig. 1. However, even there it is immediately apparent that the "opening" is not defined such that pole crossings define two non-adjacent pair of vertices, as recited in the claims. Instead, two opposite lateral vertices of the opening are formed by the crossings of tubular elements 36 and 37. However, there is no second pair of vertices. What the Examiner has misconstrued as "vertices" are in reality the pivot points where the adjacent ends of tubular elements 36, 36 and 37, 37 respectively connect. They are not points where poles cross, as recited in the claims. Although Gwin shows the bungee cords 28 extending between the pivot points, the pivot points are not vertices of the opening formed by crossing poles under tension. The reason is simple: Gwin discloses a completely different type of structure than the structure described and claimed in the present Application. Moreover, and because the Gwin structure is a completely different type of structure, the bungee cords extending between the pivot points are not intended to tension the structure formed by the crossing tubular elements 36, 37. Rather, this structure that Gwin provides a mechanism for tensioning the bungee cords themselves, as shown in Fig. 5. See Col. 2, line 64 - col. 3, line 9.

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It is clear that the Examiner has taken a portion of a structure from Gwin completely out of context, has misread or mischaracterized it, and with knowledge of the presently claimed invention, has sought to combine the portion of Gwin with Kramer et al. to reconstruct the invention. That approach is completely improper.

Moreover, the Examiner has given no reason whatsoever why a person of ordinary skill in the art would be led to combine the teachings of Gwin and Kramer et al., when they clearly describe very different structures, and where the portion to be combined (from Gwin) has a completely different purpose, as described in the Gwin specification, as cited above.

CONCLUSION

In short, the newly cited references clearly do not disclose or suggest either alone or in combination the presently recited invention, any more than any of the other references the Examiner has previously relied upon, then abandoned. The Examiner continues to misread and mischaracterize the references, and to combine them without any motivation to do so, except to reconstruct the recited invention. The Examiner's actions in this prosecution have prejudicially and unnecessarily cost the Applicant both patent term and money. The Examiner has not cited any formality rejections to the claims, and they are in proper form for allowance. Clearly they recite patentable subject matter.

If the Examiner is not inclined to allow this Application, then Applicant respectfully requests an interview with the Examiner *and her supervisor* before Applicant is required to take any further action in connection with the Application.

Respectfully submitted,



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